

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CASE NO.: 5:13-cv-113-RLV-DCK

GULF COAST BANK & TRUST COMPANY,
SUCCESSOR BY ASSIGNMENT TO THE
FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR
PARKWAY BANK,

Plaintiff,

vs.

MINGO TRIBAL PRESERVATION TRUST,
JESSE W. HORTON, JR., TRUSTEE AND
JESSE W. HORTON, JR., INDIVIDUALLY,

Defendants

MOTION TO REMAND

Mingo Tribal Preservation Trust (Mingoö), Jesse W. Horton, Jr., Trustee (öTrusteeö), and Jesse W. Horton, Jr., individually (öHortonö)(collectively öDefendantsö), move the Court to remand this action to the Superior Court of Caldwell County, North Carolina pursuant to 28 U.S.C. § 1447(c), or in the alternative, to decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c), and state as follows:

1. This action was initiated by Parkway Bank on July 28, 2011, seeking to recover a deficiency that it alleged remained on a loan after foreclosure and application of the foreclosure proceeds to the amounts alleged to be owed to Parkway by Defendants.

2. On April 26, 2013, Parkway was closed by the North Carolina Office of the Commissioner of Banks and the Federal Deposit Insurance Corporation was appointed as Receiver (the öFDIC-Rö).

3. On August 2, 2013, the FDIC-R was substituted as Plaintiff in place of Parkway Bank.

4. On August 12, 2013, the FDIC-R removed this case to the United States District Court pursuant to 12 U.S.C. § 1819(b)(2)(B) and 28 U.S.C § 1441(b), which authorize the FDIC-R to remove actions pending in state court to the appropriate federal court within ninety (90) days of being made a party to the action. (Doc. 1)

5. On October 9, 2015, after deciding to sell the loan that is subject of this action (the "Loan"), the FDIC-R filed its Consent Motion to Stay Proceeding (Doc. 46) and requested that this matter be stayed to allow a purchaser of the Loan to become the plaintiff in this action.

6. On October 13, 2015, the Court issued an order (Doc. 47) granting FDIC-R's Consent Motion to Stay pending substitution of the new plaintiff and further ordered the parties to file a status report and new proposed scheduling order on or before January 8, 2016.

7. On December 9, 2015, the FDIC and Gulf Coast entered into an Assignment and Assumption of Interests and Obligations (the "Assignment") which assigns to Gulf Coast the loan entered into between Mingo and Parkway.

8. On January 27, 2016, the FDIC filed a Motion to Substitute Gulf Coast as the Plaintiff in this action and to remove the FDIC as a party. (Doc. 50)

9. On January 27, 2016, the Court entered an Order allowing the Motion to Substitute Gulf Coast as the Plaintiff and terminating the FDIC as a party to this action. (Doc. 51)

10. Pursuant to 28 U.S.C. § 1447(c), "if at any time before final judgment it appears that the federal district court lacks subject matter jurisdiction, the case shall be remanded."

11. Once the FDIC-R was terminated as a party the sole basis for federal subject matter jurisdiction, the presence of the FDIC-R as a party, ended and the court should remand this case back to state court

12. In the alternative, if the Court should determine that it retains supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c), the Court should decline to exercise such jurisdiction as this action contains only state law claims and the vast majority of the litigation in this matter has previously been conducted in state court.

13. Defendants contemporaneously submit their Memorandum in support of the Motion to Remand.

14. Counsel for Defendants has consulted with counsel for Gulf Coast Bank and Trust and they object to the Motion to Remand.

Respectfully submitted this 9th day of February 2016.

/s/ Keith J. Merritt

Keith J. Merritt (N.C. Bar No. 17523)
Hamilton Stephens Steele & Martin, PLLC
201 South College Street, Suite 2020
Charlotte, NC 28244-2020
704.344.1117
704.344.1483 (Facsimile)
kmerritt@lawhssm.com
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by email and first class US Mail to:

R. Kent Warren

Email: kwarren@mcguirewoods.com

McGuireWoods LLP

201 N. Tryon St., Suite 3000

Charlotte, NC 28202

704-343-2365

Fax: 704-805-5081

Robert J. Waddell , Jr

Email: rwaddell@mcguirewoods.com

McGuireWoods LLP

1230 Peachtree Street, NE, #2100

Atlanta, GA 30309

404-443-5500

Fax: 404-443-5781

Attorneys for Plaintiff Gulf Coast Bank & Trust

This the 9th day of February, 2016.

s/ Keith J. Merritt

HAMILTON STEPHENS

STEELE + MARTIN, PLLC

201 S. College Street, Ste. 2020

Charlotte, NC 28244

Telephone: 704-344-1117

Facsimile: 704-344-1483